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No. 81-2297

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT EARL WARD, JR. a/k/a
"BUCK" WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether collateral estoppel principles embodied in the Double Jeopardy Clause barred petitioner's federal prosecution for willful violation of federal regulations governing disposal of toxic chemicals following his acquittal in state court on charges of causing felonious damage to state property based on some of the same underlying incidents.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A30-A44) is reported at 676 F.2d 94.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1982. A petition for rehearing was denied on April 14, 1982 (Pet. App. A45). The petition for a writ of certiorari was filed on June 14, 1982 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, Congress enacted the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.* (TSCA), to prevent

"an unreasonable risk of injury to health or the environment" from "manufacture, processing, distribution in commerce, use, or disposal [of] * * * chemical substances and mixtures * * *." 15 U.S.C. 2601(a). In the Act, Congress specifically directed the Administrator of the Environmental Protection Agency (EPA) to adopt regulations governing the disposal of polychlorinated biphenyls (PCBs), 15 U.S.C. 2605(e)(1)(A).[1] This "special attention accorded to PCBs in the Toxic Substances Control Act resulted from the recognized seriousness of the threat that PCBs pose to the environment and human health." *Environmental Defense Fund* v. *EPA*, 636 F.2d 1267, 1271 (D.C. Cir. 1980).[2] Section 15(1)(C) of TSCA, 15 U.S.C. 2614(1)(C), makes it unlawful to fail to comply with EPA regulations governing PCBs, and Section 16(b), 15 U.S.C. 2615(b), prescribes criminal penalties for violations which are knowing and willful.

The Administrator issued regulations for the disposal of PCBs on February 17, 1978. 43 Fed. Reg. 7150 *et seq.*

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[1] The Act also imposes a phased ban on the manufacture, processing, and distribution in commerce of PCBs except in a "totally enclosed manner" or under exemptions granted by the EPA Administrator. 15 U.S.C. 2605(e)(2) and (3).

[2] PCBs are mixtures of compounds consisting of biphenyl molecules with varying numbers of chlorine atoms attached. They are extremely toxic and pose carcinogenic as well as other risks to man (*e.g.*, birth defects). See *Environmental Defense Fund* v. *EPA*, *supra*, 636 F.2d at 1270. Other characteristics of PCBs magnify their risks. First, PCBs present in water "bioaccumulate" in fish and other aquatic organisms. Animals, including man, feeding on such aquatic forms may "biomagnify" concentrations of PCBs in their tissues from contaminated food sources. Finally, PCBs are extremely stable compounds. They persist in their toxic form over long periods of exposure and they are not readily biodegradable.

The regulations, which became effective on April 18, 1978, required that any liquid mixture containing more than 500 parts per million (ppm) PCB be disposed of in an incinerator that complied with certain specifications. *Id.* at 7157-7158. Such material was also permitted to be stored under special conditions set forth in the regulations. *Id.* at 7158.[3]

2. Petitioner, Robert Earl Ward, Jr., is chairman of the board of Ward Transformer Company located in Raleigh, North Carolina. The company is in the business of purchasing, rebuilding and reselling used electrical transformers. For many years, oil containing PCBs has been used as a coolant in transformers because such oil has a very high flash point and a correspondingly low fire hazard potential. Accordingly, in early 1978, Ward had both PCB oil-filled transformers and spare PCB oil stored in 55-gallon drums on the premises of his business. He realized that he had to dispose of these items in accordance with the new EPA regulations.

Petitioner entered into an agreement with Robert J. Burns, an old friend and sometime business associate. Under this arrangement, Burns was to remove the PCB oil from the premises of Ward Transformer Company and transport it to Youngsville, Pennsylvania, where Burns acquired storage facilities (Pet. App. A33-A34).[4] Initial-

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[3] Other methods of disposal were authorized for (1) non-liquid PCB mixtures in the form of PCB-contaminated soil, rags or other debris; (2) soil and debris contaminated as a result of a spill; and (3) all dredge spoils and municipal sewage treatment sludges. 43 Fed. Reg. 7158 (1978). These regulations were superseded in 1979; the current PCB disposal regulations are codified at 40 C.F.R. 761.10.

[4] Burns was to be paid a fee of $1.70 per gallon for removing the oil. 70 cents per gallon was to be returned, in cash, to retire a $50,000 debt Burns owed petitioner. As the court of appeals noted, the entire

ly, this plan was followed; Burns transported PCB oil in 55-gallon drums from Ward Transformer Company to Youngsville in the spring of 1978.

Eventually, however, problems were encountered and PCB oil from Ward's premises was disposed of by illegal dumping. After some initial experiments (see Pet. App. A34-A35), the dumping was accomplished by discharging the PCB oil from the side of a moving truck onto the shoulders of roads in rural North Carolina (*id.* at A36). Through repeated night-time trips, approximately 7,500 gallons of PCB oil was disposed of in this manner along many miles of road in fourteen North Carolina counties.[5] The resulting long strips of discolored grass, four to six inches wide, were quickly discovered and identified by federal and state authorities (*id.* at A37). Samples from the blackened strips were found to contain PCBs in concentrations of from 2,200 to 14,800 ppm (*id.* at A42).

Burns was apprehended and confessed his involvement in the illegal dumping (Pet. App. A37). Initially, however, he claimed that petitioner had no knowledge of the illegal dumping activities *(ibid.)*. In the late fall of 1978, however, Burns repudiated his exculpatory statements and admitted that petitioner had been intimately involved in the dumping scheme *(ibid.)*.

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plan was to set up Burns as the "PCB king." He would store PCB oil and supply it to transformer dealers, when needed, for reconditioning of transformers (Pet. App. A33).

[5] In *Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 281 (E.D.N.C. 1981), a case involving North Carolina's plans for cleaning up the contaminated roadsides, the district court summarized the results of the dumping as affecting 51 separate sites in fourteen counties involving 211 miles of roadside.

3. On January 22, 1979, petitioner was indicted by a grand jury of the State of North Carolina on two counts of malicious and felonious damage to real property of the State based on the PCB dumping in Halifax County alone and upon one count of conspiracy to commit those offenses (Pet. App. A1-A12). On the same day, he was indicted by a federal grand jury in the Eastern District of North Carolina on eight counts of having "knowingly and willfully caused polychlorinated biphenyls, also known as PCB's, to be disposed of" in violation of TSCA and regulations thereunder and aiding and abetting such disposal in violation of 18 U.S.C. 2. The eight counts each identified a separate disposal area and included locations in ten North Carolina counties (Pet. App. A13-A25).

The state charges were tried first and resulted in petitioner's acquittal by jury verdict (Pet. App. A38). Petitioner then sought to dismiss the federal charges on double jeopardy grounds. In response to petitioner's motion to dismiss, the government advised the court that prosecution of petitioner had been reviewed by the appropriate authorities in the Department of Justice under the *Petite* policy. See *Petite* v. *United States*, 361 U.S. 529, 530 (1960). Approval for the prosecution was given because of a clear showing of a compelling interest associated with dumping of PCBs and the recognition that the statutes involved in the state and federal cases were substantially different. The district court denied petitioner's motion to dismiss, noting that the federal and state charges were substantially different and that a federal prosecution is not barred by a prior state prosecution for the same acts.

After a jury trial, petitioner was convicted on all eight counts charged in the federal indictment. He was sentenced to a total of two and one-half years' imprisonment, a further year's imprisonment suspended on condition of a

five-year probation, and a $200,000 fine (Pet. App. A21-A25). The court of appeals affirmed (Pet. App. A30-A44).

ARGUMENT

Relying on *Ashe* v. *Swenson*, 397 U.S. 436 (1970), petitioner contends that collateral estoppel principles barred his trial on the federal charges following his acquittal on the state charges. This contention is clearly without merit. *Ashe* involved the successive prosecution of a defendant by the same sovereign after the defendant had been acquitted on charges arising from the same incident. This case, in contrast, involves prosecutions brought by two different sovereigns for offenses which, perforce, had to be tried separately in separate forums. It is fundamental that the United States cannot be estopped in a criminal prosecution by the result of a proceeding in which it was not a party.

The state and federal offenses on which petitioner was separately prosecuted protected significantly different interests of the two separate sovereigns. The interest of the State of North Carolina was in protecting its property and that of its residents from intentional and malicious damage.[6] The federal interest implicated in the present case is vigorous enforcement of regulations mandated by Congress to protect the health and the environment enjoyed by this Nation's citizens from hazardous chemical substances used in commerce. See 15 U.S.C. 2601. Thus, this case falls within the core area of the dual sovereignty doctrine recognized in the decisions of this Court. See *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United*

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[6] This interest is illustrated by the cost and effort expended by the State in attempting to clean up the road shoulders contaminated by the PCB dumping. See *Warren County* v. *State of North Carolina*, *supra*, 528 F. Supp. at 281.

States, 359 U.S. 187 (1959); *United States* v. *Wheeler*, 435 U.S. 313 (1978). That doctrine preserves the authority of each separate sovereign to enforce its own laws free of barriers that might be imposed by the actions of another sovereign in prosecuting the same offender. See, *e.g.*, *United States* v. *Wheeler*, *supra*, 435 U.S. at 316-318.

Petitioner argues (Pet. 18-20, 23), however, that the dual sovereignty doctrine is inapplicable here because of the "participation" of an Environmental Protection Agency (EPA) attorney in both the state and federal trials. Although the parties to this case stipulated that the EPA attorney attended the state trial and "consulted with attorneys for the State of North Carolina * * *" (Pet. App. A27),[7] the cooperation of EPA personnel in the state prosecution was insufficient to convert the independent state action into a federal prosecution. Compare *Bartkus* v. *Illinois*, *supra*, 359 U.S. at 122-123; *id.* at 165-166 (Brennan, J., dissenting).[8]

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[7] Several employees of the EPA were called to testify at the state trial concerning identification of PCBs in the dumped oil and the dangerous nature of the chemical substance. The EPA attorney attended the state trial as counsel to those witnesses and discussed their testimony with the state prosecutors.

[8] Even if the dual sovereignty doctrine did not completely dispose of petitioner's collateral estoppel claim, petitioner's reliance on *Ashe* v. *Swenson*, *supra*, would be misplaced. In *Ashe*, the court concluded that "[w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, * * * a court [is required] to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " 397 U.S. at 444, quoting Mayers & Yarbrough, *Bis*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1982

Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960).

Here, petitioner seeks to rely on the general verdict of acquittal in the state trial as representing a specific finding by the state jury that petitioner did not participate in the dumping scheme (Pet. 19, 21). There were, however, several elements of proof necessary for conviction on the state charges that were not required to establish petitioner's guilt on the federal charges. The state charges required a showing of malice and damage to real property irrespective of the nature of the substance dumped and the manner of its disposal. The federal charges, on the other hand, did not require that actual damage be shown but they did require proof that the substance disposed of was subject to the federal regulations, *i.e.*, contained 500 ppm PCBs, and that the disposal contravened the regulations (Pet. App. A38). Thus, although the nature of petitioner's involvement in the dumping scheme was a major issue at the state trial, there is no evidence in the record that it was the sole contested issue. Accordingly, it is quite conceivable that the state jury may have based its verdict of acquittal on a ground other than that of petitioner's participation.

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